

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

\* \* \*

GABRIEL HERNANDEZ, RODOLFO  
NAVA, IVAN MADRIGAL,  
FRANCISCO CASTILLO, JOEL ROSA  
DE JESUS, JUAN CARLOS  
NAVARRETE, JUAN JOSE ACOSTA  
FLORES, ISMAEL AMPARAN-COBOS,  
EFREN RUANO, JUAN PALOMERA,  
OCTAVIO ANCHONDO, ARNOLDO  
RODRIGUEZ, and JESUS ANCHONDO,

## ORDER

2:10-CV-02132-PMP-VCF

**Plaintiffs,**

V.

CREATIVE CONCEPTS, INC.; SPEIDEL ENTERPRISES, INC.; JOHN SPEIDEL, PAUL SCHELLY; NORTHERN PIPELINE CONSTRUCTION CO.; and NPL CONSTRUCTION CO..

## Defendants

Presently before the Court is Defendant NPL Construction Co.'s Motion for Summary Judgment Seeking Dismissal of All Claims Asserted by Plaintiff Ivan Madrigal Based Upon his General Release of Claims (Doc. #170), filed on February 9, 2013. Plaintiff Ivan Madrigal filed an Opposition (Doc. #187/#188) on March 11, 2013. Defendant filed a Reply (Doc. #225) on April 6, 2013.

## I. BACKGROUND

The parties are familiar with the facts of this case and the Court will not repeat them here except where necessary. Defendant NPL Construction Co. (“NPL”) moves for summary judgment on all claims asserted by Plaintiff Ivan Madrigal (“Madrigal”) based on

1 a general release provision contained in a settlement agreement Madrigal entered into with  
 2 NPL shortly before this lawsuit was filed.

3 On November 14, 2009, Madrigal and NPL entered into a Full and Complete  
 4 Confidential Settlement Agreement and Release of Claims (“Agreement”), which settled  
 5 wage and hour claims in a separate lawsuit against NPL that were unrelated to the claims in  
 6 the present action before this Court. (Mot. for Summ. J. Seeking Dismissal of All Claims  
 7 Asserted by Ivan Madrigal Based Upon his Gen. Release of Claims (Doc. #170) [“MSJ”],  
 8 Ex. 1, Attach. E at 1.) In the separate lawsuit, Madrigal was represented by the law firm  
 9 Reich, Adell & Cvitan, P.C. (MSJ, Ex. 1 at 2.) By the time the Agreement was executed,  
 10 Madrigal and the other Plaintiffs in this action had retained counsel, Stanley Broome  
 11 (“Broome”) of the Broome Law Firm, to represent them with respect to the claims at issue  
 12 in this case. (Pl. Ivan Madrigal’s Opp’n to Def. NPL’s Mot. Summ. J. (Doc. #188)  
 13 [“Opp’n”], Ex. 4 at 1.) At the time the parties executed the Agreement, NPL and its  
 14 attorneys were aware that Madrigal was represented by Broome in relation to Madrigal’s  
 15 claims at issue in this case. (Opp’n, Ex. 3 at 2; MSJ, Ex. 1, Attach. B at 208 (Madrigal  
 16 testifying at his deposition, attended by NPL’s attorney, that his counsel in the wage and  
 17 hour lawsuit was not representing him in this lawsuit).) However, neither Madrigal’s  
 18 counsel at Reich, Adell & Cvitan, P.C. nor NPL’s counsel contacted Broome regarding the  
 19 negotiation and execution of the Agreement. (Opp’n, Ex. 4 at 2.)

20 Section III.A.2 of the Agreement provides:

21 [Madrigal] hereby release[s] NPL . . . from any and all claims,  
 22 grievances, demands or causes of action which [Madrigal] may own or  
 23 hold at any time prior to the date of this Agreement. The scope of this  
 24 Agreement’s Release is specifically intended to include, but is not  
 25 limited to, any and all claims, demands or causes of action for wages,  
 26 compensation or benefits for services rendered; any claim under Title  
 VII of the Civil Rights Act of 1964 . . . or any other federal, state or  
 local law, regulation, or ordinance prohibiting employment  
 discrimination, dictating the payment of wages to employees, or  
 otherwise governing the employment relationship. This Agreement’s  
 Release also includes, but is not limited to, any claim for negligent or

1       intentional infliction of emotional distress, defamation, slander, libel,  
 2       fraud, misrepresentation, termination in violation of public policy,  
 3       wrongful termination, retaliation, breach of contract (whether written,  
 4       oral, or implied), breach of the implied covenant of good faith and fair  
 5       dealing, or any other claim, however styled, relating to or arising out of  
 6       [Madrigal's] employment with [NPL] prior to or on the date [Madrigal  
 7       signs] this Agreement. This Agreement's Release does not include any  
 8       claim for violation of the California Workers' Compensation Act  
 9       brought before the California Workers' Compensation Appeals Board.

10      (MSJ, Ex. 1, Attach. E at 2-3.) Section IV.10 provides that if any party to the Agreement  
 11     brings an action to enforce it, the prevailing party is entitled to recover costs, expenses, and  
 12     attorney's fees. (*Id.* at 9.)

13      Madrigal was one of several Plaintiffs who filed this action against NPL on  
 14     December 4, 2009, less than a month after Madrigal and NPL executed the Agreement.  
 15     (MSJ, Ex. 4.) Nearly three years later, on November 27, 2012, NPL's current counsel in  
 16     this action received a copy of the Agreement. (MSJ, Ex. 2 at 2.) The next day, NPL's  
 17     counsel contacted Broome, advised him of the Agreement and its release of claims, and  
 18     forwarded a draft stipulation of dismissal of Madrigal's claims against NPL in this action.  
 19     (*Id.*) NPL disclosed a heavily redacted copy of the Agreement for the first time in a formal  
 20     discovery response on November 28, 2012, as part of NPL's Third Supplemental  
 21     Disclosures. (Opp'n, Ex. 5.)

22      NPL now moves for summary judgment on all claims asserted by Madrigal,  
 23     arguing the general release in the Agreement bars Madrigal from pursuing his claims  
 24     against NPL in this action. NPL contends Madrigal was represented by counsel when he  
 25     signed the agreement, he and his counsel were aware of Madrigal's potential claims against  
 26     NPL in this case when Madrigal signed the general release, and the general release by its  
 27     terms applies to these claims. NPL also seeks attorney's fees and costs for having to bring  
 28     this motion, a remedy provided for in the settlement agreement.

29      Plaintiff Madrigal responds that NPL failed to plead this affirmative defense in  
 30     its Answer with sufficient factual support. Madrigal asserts that NPL's failure to timely

1 assert the defense has prejudiced Madrigal where NPL did not raise this argument until over  
2 three years after Madrigal filed this suit even though NPL was aware of it from the time the  
3 lawsuit was filed. Madrigal further contends that NPL did not provide the Agreement in its  
4 initial disclosures and refused to provide Madrigal with information related to the  
5 Agreement during discovery once NPL finally asserted in late November 2012 that the  
6 Agreement barred Madrigal's claims, contending any such discovery would not be relevant.  
7 Madrigal asserts NPL cannot now claim the Agreement is relevant.

8 Madrigal argues he would be prejudiced by allowing NPL to raise this argument  
9 at this late date because he has not been given the opportunity to conduct discovery on the  
10 issue, and he disputes that he knowingly and intentionally entered into an agreement that  
11 waived his claims in this action. Madrigal contends that when he learned NPL was  
12 asserting the Agreement barred his claims, he attempted to take discovery on the issue but  
13 NPL refused to provide any information. Madrigal contends he would have deposed NPL's  
14 former attorney, who provided an affidavit in support of NPL's Motion, on issues such as  
15 why Madrigal's current attorney was not consulted regarding an agreement that would  
16 foreclose Madrigal's claims in this case when NPL knew at the time the Agreement was  
17 negotiated and executed that Madrigal was represented by different counsel in this case.  
18 Madrigal also contends he would have deposed other individuals involved in the settlement  
19 of the prior case to investigate their understanding of the Agreement.

20 On the merits, Madrigal argues that the release provisions in the Agreement  
21 should be voided and rescinded based on mutual mistake, as Madrigal did not intend to  
22 release his current claims. Madrigal offers his own affidavit that he had no such intention.  
23 Madrigal argues there is evidence NPL's counsel also did not intend for the release to cover  
24 Madrigal's claims in this action because she knew Madrigal was represented by separate  
25 counsel, yet she did not contact counsel even though failure to do so would violate  
26 California Rules of Professional Conduct. Additionally, Madrigal argues the Agreement

1 provides no separate consideration for releasing Madrigal's claims in this action.  
2 Moreover, Madrigal argues that NPL's failure to argue for years that the Agreement barred  
3 Madrigal's claims suggests NPL also did not believe the Agreement had that effect.

4 Alternatively, Madrigal moves to defer ruling on the Motion until Madrigal is  
5 permitted to conduct discovery on the issue. Madrigal contends that if discovery is  
6 permitted, NPL should have to pay for Madrigal's attorney's fees and costs for such  
7 discovery due to NPL's prior discovery-related conduct on this issue. Finally, Madrigal  
8 argues NPL is not entitled to attorney's fees or costs because NPL should not be the  
9 prevailing party. Instead, Madrigal asserts he should receive his attorney's fees and costs as  
10 the prevailing party.

11 NPL replies that any mistake was not mutual, and Madrigal presents no other  
12 evidence or substantive argument to preclude applying the release against him. NPL  
13 contends it pled this affirmative defense in its Answer, and affirmative defenses need not  
14 meet the pleading standard for complaints. NPL further contends that even if it did not  
15 adequately plead the defense in its Answer, it nevertheless should be allowed to raise it now  
16 because Madrigal is not prejudiced. NPL asserts that from the time NPL provided the  
17 Agreement in November 2012, Madrigal has done little to pursue discovery on the issue,  
18 and did not indicate any concerns regarding NPL's responses to Madrigal's discovery  
19 requests. Finally, NPL contends the attorney affidavit supporting Madrigal's request to  
20 defer ruling on the Motion pending further discovery is deficient.

## 21 II. DISCUSSION

22 In NPL's Answer to the Second Amended Complaint, NPL asserts as its twenty-  
23 fifth defense that "Plaintiffs' claims are waived or released." (Def. NPL Constr. Co.'s  
24 Answer to Pls.' Second Am. Compl. (Doc. #43) at 11.) Madrigal contends this defense is  
25 inadequately pled because affirmative defenses must be plead with sufficient factual  
26 support to be plausible, just as complaints must be pled under Bell Atlantic Corp. v.

1       Twombly, 550 U.S. 544 (2007). NPL responds that Twombly does not apply to affirmative  
 2 defenses. Alternatively, NPL argues that even if Twombly applies, controlling authority  
 3 permits a defendant to assert unpled or inadequately pled affirmative defenses for the first  
 4 time at the summary judgment stage.

5       The Court need not decide whether Twombly sets the pleading standard for  
 6 affirmative defenses<sup>1</sup> because NPL's affirmative defense fails even under the more liberal  
 7 pleading standard which controls if Twombly does not apply. Under pre-Twombly law,  
 8 “[t]he key to determining the sufficiency of pleading an affirmative defense is whether it  
 9 gives plaintiff fair notice of the defense.” Wyshak v. City Nat'l Bank, 607 F.2d 824, 827  
 10 (9th Cir. 1979) (per curiam).

11      NPL's twenty-fifth affirmative defense refers to waiver “or” release.  
 12 Consequently, it is unclear whether Plaintiffs are alleged to have waived their claims or  
 13 released their claims. Moreover, at the time NPL filed its Answer, there were thirteen  
 14 Plaintiffs identified in the caption. By lumping all Plaintiffs together, NPL did not give fair  
 15 notice as to which Plaintiffs allegedly waived or released their claims, much less whether  
 16 each particular Plaintiff is alleged to have waived his claim or to have released it. Even  
 17 without requiring sufficient factual allegations to establish a plausible entitlement to relief  
 18 under Twombly, NPL's twenty-fifth affirmative defense did not give fair notice to Plaintiff  
 19 Madrigal that NPL was asserting as an affirmative defense that Madrigal had released his  
 20 claims against NPL. See Woodfield v. Bowman, 193 F.3d 354, 362 (5th Cir. 1999) (stating  
 21 that “baldly ‘naming’ the broad affirmative defenses of ‘accord and satisfaction’ and

---

22      <sup>1</sup> No circuit has decided this issue. The district courts, including this Court, are divided over  
 23 the question. See, e.g., Barnes v. AT & T Pension Ben. Plan–Nonbargained Program, 718 F. Supp.  
 24 2d 1167, 1171-72 (N.D. Cal. 2010) (collecting cases); Hayne v. Green Ford Sales, Inc., 263 F.R.D.  
 25 647, 649-50 nn.14-15 (D. Kan. 2009) (collecting cases). Compare Ferring B.V. v. Watson Labs., Inc. -  
(FL), No. 3:11-CV-00481-RCJ-VPC, 2012 WL 607539, at \*2-3 (D. Nev. Feb. 24, 2012) (unpublished),  
with Valley Health Sys. LLC v. Total Elec. Servs. & Supply Co., No. 2:10-CV-0949-LRH-LRL, 2010  
 26 WL 4456917, at \*2 (D. Nev. Oct. 29, 2010) (unpublished).

1 ‘waiver and/or release’ falls well short of the minimum particulars needed to identify the  
 2 affirmative defense in question and thus notify [the third party plaintiff] of [the third party  
 3 defendant’s] intention to rely on the specific, contractual defense of requiring the [insureds]  
 4 to obtain the insurer’s consent before settling with [the third party plaintiff”].

5 Release is an affirmative defense, and the failure to properly raise an affirmative  
 6 defense in the defendant’s answer waives that defense. In re Cellular 101, Inc., 539 F.3d  
 7 1150, 1155 (9th Cir. 2008); Fed. R. Civ. P. 8(b), (c). However, the United States Court of  
 8 Appeals for the Ninth Circuit has “liberalized the requirement that defendants must raise  
 9 affirmative defenses in their initial pleadings.” Magana v. Commonwealth of the N. Mar.  
 10 L., 107 F.3d 1436, 1446 (9th Cir. 1997).<sup>2</sup> The Court has discretion to permit a defendant to  
 11 raise an affirmative defense for the first time in a motion for judgment on the pleadings or  
 12 at summary judgment, but “only if the delay does not prejudice the plaintiff.” Id.; Simmons  
 13 v. Navajo Cnty., Ariz., 609 F.3d 1011, 1023 (9th Cir. 2010).

14 However, none of the Ninth Circuit cases allowing a defendant to raise an unpled  
 15 or inadequately pled affirmative defense for the first time in a motion for judgment on the  
 16 pleadings or a motion for summary judgment evaluated whether the defendant should be  
 17 required to meet Federal Rule of Civil Procedure 16(b)’s “good cause” standard if a  
 18 scheduling order is in place. Additionally, to the extent these cases stand for the  
 19 proposition that prejudice to the plaintiff is the only inquiry, these cases truncate the Rule  
 20 15(a) analysis, which, in addition to prejudice to the opposing party, considers bad faith,  
 21 undue delay, futility of amendment, and whether the moving party previously has amended  
 22 the pleading at issue. United States v. Corinthian Colls., 655 F.3d 984, 995 (9th Cir. 2011);  
 23 see also Owens v. Kaiser Found. Health Plan, Inc., 244 F.3d 708, 711-12 (9th Cir. 2001)

---

25       <sup>2</sup> See also Ledo Fin. Corp. v. Summers, 122 F.3d 825, 827 (9th Cir. 1997); Camarillo v.  
 26 McCarthy, 998 F.2d 638, 639 (9th Cir. 1993); Rivera v. Anaya, 726 F.2d 564, 566 (9th Cir. 1984);  
Healy Tibbitts Constr. Co. v. Ins. Co. of N. Am., 679 F.2d 803, 804 (9th Cir. 1982) (per curiam).

1 (evaluating the propriety of amendment to add an unpled affirmative defense under the  
2 Rule 15 factors, not just prejudice to the plaintiff). Allowing a defendant to amend to add  
3 an unpled or inadequately pled affirmative defense without evaluating all of the Rule 15(a)  
4 factors is unwarranted. A plaintiff is not permitted to raise a new or inadequately pled  
5 claim at the summary judgment stage without meeting Rule 16(b) and Rule 15(a)'s  
6 requirements. See, e.g., Pickern v. Pier 1 Imports (U.S.), Inc., 457 F.3d 963, 968-69 (9th  
7 Cir. 2006). A defendant should fare no better.

8 Where a party seeks to amend a pleading after the pretrial scheduling order's  
9 deadline for amending the pleadings has expired, the moving party must satisfy the stringent  
10 "good cause" standard under Federal Rule of Civil Procedure 16(b), not the more liberal  
11 standard under Rule 15(a). AmerisourceBergen Corp. v. Dialysist West, Inc., 465 F.3d 946,  
12 952 (9th Cir. 2006); see also Johnson v. Mammoth Recreations, Inc., 975 F.2d 604, 607-08  
13 (9th Cir. 1992) (noting once a district court files a pretrial scheduling order under Federal  
14 Rule of Civil Procedure 16 establishing a timetable for amending pleadings, that rule's  
15 standards control). Unlike Rule 15(a)'s liberal amendment policy, which focuses on undue  
16 delay and prejudice to the other party, Rule 16(b)'s "good cause" standard centers on the  
17 moving party's diligence. Johnson, 975 F.2d at 609. A "district court may modify the  
18 pretrial schedule 'if it cannot reasonably be met despite the diligence of the party seeking  
19 the extension.'" Id. (quoting Fed. R. Civ. P. 16 advisory committee's note (1983  
amendment)). "[C]arelessness is not compatible with a finding of diligence and offers no  
20 reason for a grant of relief." Id. If the moving party is able to satisfy the good cause  
21 standard under Rule 16, then the Court will examine whether amendment also is proper  
22 under Rule 15(a). Id. at 607-08.

24 By failing to adequately plead the defense and then raising the issue for the first  
25 time at summary judgment, NPL effectively moves to amend its Answer to adequately plead  
26 the affirmative defense of release against Plaintiff Madrigal. The scheduling order in this

1 case, which includes dates that were stipulated to by the parties, sets the cutoff date for  
2 amending pleadings as November 1, 2012. (Am. Scheduling Order (Doc. #104) at 5.) NPL  
3 did not move for summary judgment on this issue until February 9, 2013, past the deadline  
4 to amend pleadings. Accordingly, the Court, in its discretion, will decline to allow NPL to  
5 raise the affirmative defense of release against Madrigal for the first time in its summary  
6 judgment motion unless NPL can demonstrate good cause to amend the scheduling order,  
7 and also can show that amendment of its Answer is proper. NPL shall file a brief on or  
8 before August 30, 2013, which addresses only whether amending the scheduling order  
9 under Rule 16(b) and amending NPL's Answer under Rule 15(a) is proper. Madrigal shall  
10 file a response on or before September 10, 2013. NPL shall file a reply by September 16,  
11 2013. The Court will deny NPL's Motion for Summary Judgment Seeking Dismissal of All  
12 Claims Asserted by Plaintiff Ivan Madrigal (Doc. #170), without prejudice to renew if NPL  
13 is permitted to amend to adequately plead its affirmative defense.

14 **III. CONCLUSION**

15 IT IS THEREFORE ORDERED that Defendant NPL Construction Co. shall file  
16 a brief on or before August 30, 2013, which addresses only whether amending the  
17 scheduling order under Rule 16(b) and amending NPL's Answer under Rule 15(a) is proper.

18 IT IS FURTHER ORDERED that Plaintiff Ivan Madrigal shall file a response on  
19 or before September 10, 2013.

20 IT IS FURTHER ORDERED that Defendant NPL Construction Co. shall file a  
21 reply by September 16, 2013.

22 ///

23 ///

24 ///

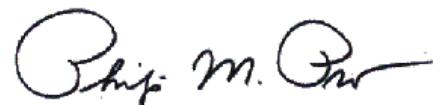
25 ///

26 ///

1 IT IS FURTHER ORDERED that Defendant NPL Construction Co.'s Motion for  
2 Summary Judgment Seeking Dismissal of All Claims Asserted by Plaintiff Ivan Madrigal  
3 Based Upon his General Release of Claims (Doc. #170) is hereby DENIED, without  
4 prejudice to renew if NPL is permitted to amend its Answer to adequately plead its  
5 affirmative defense.

6

7 DATED: August 16, 2013



8  
9 PHILIP M. PRO  
United States District Judge

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26